

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

January 22, 2004

IN RE:

**IMPLEMENTATION OF THE FEDERAL
COMMUNICATIONS COMMISSION'S
TRIENNIAL REVIEW ORDER – 9
MONTH PROCEEDING – SWITCHING**

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**DOCKET NO.
03-00491**

ORDER GRANTING *MCI'S MOTION TO COMPEL*

This docket is before the Hearing Officer to address the discovery disputes between MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively "MCI") and BellSouth Telecommunications, Inc. ("BellSouth").

I. PROCEDURAL HISTORY

On October 27, 2003, MCI filed with the Tennessee Regulatory Authority ("Authority") a copy of the discovery requests it served on BellSouth. BellSouth filed its general and specific objections to MCI's requests on November 6, 2003. On December 12, 2003, MCI filed a motion to compel requesting that the Authority order BellSouth to respond to fifty-four (54) requests. BellSouth filed its response to the motion to compel on December 22, 2003, and MCI filed a reply on December 22, 2003.

During the January 5, 2004 Authority Conference, MCI and BellSouth were asked whether there had been any further discussions on the discovery disputes. The parties were unaware of any settlements, but agreed to notify the Hearing Officer as soon as possible as to the status of any discussions. On January 16, 2004, BellSouth and MCI filed separate statements

indicating that the remaining discovery disputes were request numbers 76, 77, 80, 81, 84, 85, 88, and 89.

II. GENERAL DISCOVERY PRINCIPLES

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. These rules permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.¹ Through these instruments, a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”² The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.³ The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”⁴

Further, parties may learn of information related to books, document or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.⁵ Tennessee’s rules do provide some limitations, however. Rule 26.02 permits a court to limit discovery if:

(i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less

¹ Tenn. R. Civ. P. 26.01.

² *Id.* at 26.02(1).

³ *Id.*

⁴ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

⁵ Tenn. R. Civ. P. 26.02(1).

expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.⁶

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.⁷ "Decisions to grant a motion to compel rest in the trial court's reasonable discretion."⁸

III. REMAINING DISCOVERY REQUESTS

MCI-76 Please provide a list of all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for BellSouth retail services, including all of the following: 1) full name of system; 2) acronym for system (if any); 3) detailed description of capabilities and function of system; 4) whether system was developed and is maintained by BellSouth or by third party (and name of third party).

MCI-77 Please provide a list of all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for services offered by a BellSouth subsidiary or affiliate, including all of the following: 1) full name of system; 2) acronym for system (if any); 3) detailed description of capabilities and function of system; 4) whether system was developed and is maintained by BellSouth or by third party (and name of third party).

MCI-80 Please provide a schematic drawing showing the interrelationship between all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for BellSouth retail services, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

MCI-81 Please provide a schematic drawing showing the interrelationship between all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for services offered by a BellSouth subsidiary or affiliate, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

⁶ *Id.*

⁷ *Id.* at 37.01(2).

⁸ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

MCI-84 Please provide a detailed process flow chart for all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for BellSouth retail services, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

MCI-85 Please provide a detailed process flow chart for all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for services offered by a BellSouth subsidiary or affiliate, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

MCI-88 Please provide a complete set of the current business rules for all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for BellSouth retail services, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

MCI-89 Please provide a complete set of the current business rules for all OSS used by BellSouth for pre-ordering, ordering, provisioning, maintenance and repair and billing for services offered by a BellSouth subsidiary or affiliate, including but not limited to the following: 1) full name of system; 2) acronym for system (if any).

A. Positions of the Parties

In its general and specific objections filed on November 6, 2003, BellSouth objects to request numbers 76, 77, 80, 81, 84, 85, and 88 because they are not relevant or reasonably calculated to lead to the discovery of admissible evidence. BellSouth also asserts that request numbers 77, 81, 85 and 89 are overly broad, unduly burdensome, oppressive, and not permitted by discovery rules to the extent that the requests require BellSouth to respond on behalf of subsidiaries, affiliates, or other nonparties. As to request numbers 88 and 89, BellSouth contends the requests are vague, ambiguous, overly broad, and imprecise and that request number 88 is unduly burdensome, expensive, oppressive, and excessively time consuming.⁹

⁹ See *BellSouth Telecommunications Inc.'s General and Specific Objections to MCImetro Access and Brooks Fiber's First Discovery Requests*, 14-17 (Nov. 6, 2003).

In its motion to compel, MCI argues that BellSouth's objections are misplaced. MCI asserts that these requests inquire into whether BellSouth's OSS process flows and business rules for UNE-P, UNE-L, ILEC retail services, and ILEC affiliate services are at parity. MCI asserts that seamless transparent performance in each of the OSS categories is important to a satisfactory customer experience. MCI also argues that questions involving mass market loops are critical to determine whether UNE-L will be available and supported in the absence of UNE-P.¹⁰

In its response to the motion to compel, BellSouth states that the FCC and the Authority have already determined that BellSouth provides nondiscriminatory access to its OSS in connection with BellSouth's section 271 application. Moreover, BellSouth states that MCI cited no authority for the proposition that OSS parity is a factor in the impairment analysis. BellSouth contends that the OSS used by its affiliates is not relevant because they have no obligation to provide OSS at parity. Regardless of this assertion, BellSouth contends further that MCI should obtain the information from the affiliates, not BellSouth. BellSouth acknowledges the relevancy of OSS information related to UNE-P and UNE-L, but contends that none of these requests seeks information related to these topics.¹¹

B. Findings and Conclusions

The Hearing Officer finds that the information is relevant. Recognizing that barriers other than the hot cut process may exist, the FCC directed states "to determine whether incumbent LECs are providing nondiscriminatory access to unbundled loops."¹² The FCC also directed state commissions to consider whether the incumbent's facilities and processes are

¹⁰ See *MCI's Motion to Compel*, 10 (Dec. 12, 2003); Letter to Director Jones from Jon E. Hastings dated January 16, 2004 (Jan. 16, 2004).

¹¹ See *BellSouth Telecommunications, Inc.'s Response to MCI's Motion to Compel*, 10-12 (Dec. 22, 2003); Letter to Director Jones from Guy M. Hicks dated January 16, 2004 (Jan. 16, 2004).

¹² *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 19,020, para. 512 (2003) (Report and Order).

“sufficient to handle adequately the demand for loops, collocation, cross connects, and other services required by competitors for facilities-based entry into the voice market.”¹³ Further, the FCC highlighted OSS costs as a possible factor to consider when evaluating economic barriers.¹⁴ Given these directives from the FCC, the Hearing Officer finds that information related to the OSS BellSouth uses for its retail services and affiliates could reasonably lead to information that bears on the operational and economic barriers analysis contemplated in the *Triennial Review Order*. Specifically, the information could provide insight into whether BellSouth provides nondiscriminatory access to unbundled loops and could demonstrate the sufficiency of BellSouth’s facilities and processes for competitive services by providing a basis for comparison. The information may also shed light on the OSS that will be necessary for providing retail service where switching is not obtainable from BellSouth thereby educating MCI as to the OSS costs that must be incurred in order to provide service using the most efficient network architecture.

This ruling is rendered with due regard to BellSouth’s position that the information is not relevant because the Authority has already determined, in connection with BellSouth’s Section 271 application, that BellSouth provides nondiscriminatory access to its OSS. BellSouth will be afforded the opportunity to make this argument to the panel during the hearing. BellSouth’s interpretation of the Authority’s charge to determine whether BellSouth provides “nondiscriminatory access to unbundled loops”¹⁵ should not, however, prevent MCI from developing an alternative argument on how that charge should be interpreted. Additionally, the Hearing Officer recognizes that MCI did not provide specific citation to authority to support its

¹³ *Id.*

¹⁴ *See id.* at para. 520.

¹⁵ *Id.* at para. 512

position with regard to nondiscriminatory access. Nevertheless, that authority exists, and the Hearing Officer cannot disregard it.

The Hearing Officer further finds that the requests are succinct and clearly written. BellSouth's assertions that MCI should request the information related to affiliates and subsidiaries from the affiliates and subsidiaries is misplaced as MCI is seeking information about the OSS BellSouth uses when providing services offered by affiliates and subsidiaries. BellSouth is clearly the appropriate entity to provide this information. For these reasons, the Hearing Officer finds that the motion to compel as to request numbers 76, 77, 80, 81, 84, 85, 88 and 89 should be granted and BellSouth's objections overruled.

IT IS THEREFORE ORDERED:

1. *MCI's Motion to Compel* is granted as to request numbers 76, 77, 80, 81, 84, 85, 88, and 89.
2. BellSouth shall respond to request numbers 76, 77, 80, 81, 84, 85, 88, and 89 by

Thursday, January 29, 2004.



Ron Jones, Director
As Hearing Officer¹⁶

¹⁶ During the September 22, 2003 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Deborah Taylor Tate and Directors Pat Miller and Ron Jones unanimously voted to appoint Director Ron Jones as the Hearing Officer to prepare the switching portion of this case for a hearing by the panel. *Order Appointing Hearing Officer* (Nov. 13, 2003).